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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-44

VINCENT ANTHONY FALCONE,

Petitioner,

—V.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAURICE EDELBAUM
230 Park Avenue
New York, New York 10018
Attorney for Petitioner
Vincent Anthony Falcone

Of Counsel:

LAWRENCE K. FEITELL
1450 Broadway
New York City, New York 10018

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Constitutional and Statutory Provisions Involved	1
Questions Presented	2
Statement of the Case	3
1. Introduction	3
2. The Government's Case	5
(a) Proof of the hijacking; the consignment of goods in Foreign Commerce	5
(b) The search for the missing mercury	5
(c) The Abandonment of the International Truck; the Apprehension of Petitioners	6
Reasons for Granting the Writ	7
I. The Decisions of the Court of Appeals and the District Court on the Issue of Abandonment are Clearly in Error and Conflict with Cases Decided in this Court	7
II. The Court's Charge was Patently Defective in its Treatment of the Issues of Guilty Possession as it Related to Petitioner Falcone's Status as an Alleged Aider and Abettor. Moreover, Proof of Guilty Knowledge and Possession was Insufficient Under All Counts	11
III. The Prosecutor's Summation Statements Relating to the Failure of Petitioners to Explain Their Alleged Possession of the Stolen Truck and Mercury Was Necessarily Taken by the Jury to be a Comment on the Failure of Both Petitioners to Testify	15

PAGE

IV. The Trial Court Improperly Advised the Jury that Statements of the Petitioners Made to the Watertown Police Had Been Suppressed. The Court's Remarks in this Regard Strongly Implied that Such Statements Had Been Inculpatory 17

Conclusion 21

Appendix A—Judgement of Affirmance of the United States Court of Appeals A1

Appendix B—Opinion of the United States Court of Appeals A3

Appendix C—Minutes of Court's Decision on Denial of Motion to Suppress A8

Appendix D—Constitutional and Statutory Provisions Involved A15

Authorities Cited

Cases:

Abel v. *United States,* 362 U.S. 217 9

Barfield v. *United States,* 5 Cir. 1956, 229 F. 2d 936, FN 5 ..... 12, 13, 14

Chambers v. *Maroney,* 399 U.S. 42 11

Chapman v. *California,* 1967, 386 U.S. 18 17

Coolidge v. *New Hampshire,* dec. June 21, 1971, U.S. , 9 Cr. L. 3208 ..... 2, 9, 10, 11

Desmond v. *United States,* 1 Cir., 345 F. 2d 225 17

Doty v. *United States,* 10 Cir. 1968, 416 F. 2d 887 .. 17

PAGE

Fitzpatrick v. *United States*, 5 Cir. 1969, 410 F. 2d 513 13

Garris v. *United States*, D. C. Cir., 390 F. 2d 862 20

Johnson v. *United States*, 8 Cir. 1952, 195 F. 2d 673 ..... 12, 13

Pearson v. *United States*, 6 Cir. 1951, 192 F. 2d 681 12

People v. *Cagle* (Illinois) 244 N.E. 2d 200 20

Allison v. *United States*, 10 Cir. 1965, 348 F. 2d 152 13

United States v. *Costner*, 359 F. 2d 969 20

United States v. *Cowan*, 396 F 2d 83 9

United States v. *Lefkowitz*, 284 F. 2d 310, Fn. 1 16

United States v. *Nolan*, 10 Cir. 1968, 416 F. 2d 588 17

Statutes:

18 U.S.C. §§ 2, 659, 2312 and 2314 2

18 U.S.C., §§ 659, 2312, 2314, and 2 3

18 U.S.C., § 659 4

18 U.S.C., § 2312 ..... 4, 13

18 U.S.C., § 2314 4

18 U.S.C., § 4208 a-2 4

18 U.S.C., § 2315 4

18 U.S.C., § 2 11

CONSTITUTIONAL AMENDMENTS

Fourth Amendment 1,2,10,11

Fifth Amendment 1

OTHER AUTHORITY

C.J.S. § 886(3) 13

Rules:

Fed. Rule Crim. Proc. 52(b) 14

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction.

Opinion Below

The opinion of the Court of Appeals is still unreported. It is set forth in Appendix B to this petition. The judgment of the Court of Appeals is set forth in Appendix A to this petition.

Constitutional and Statutory Provisions Involved

(1) The Fourth and Fifth Amendments to the United States Constitution.

(2) 18 U.S.C. §§ 2, 659, 2312 and 2314.

These provisions are set forth in Appendix D to this petition.

Questions Presented

1. Did the search of the truck by agents of the F.B.I. within a few minutes after the Petitioner left this vehicle, violate the Fourth Amendment?

2. Was the trial court correct in its conclusion, upon the suppression hearing, that the action of the Petitioner in taking to the woods after parking the stolen truck, constituted an abandonment of the vehicle and its contents?

3. Was the Court of Appeals correct in concluding that, because a vehicle was involved, less rigorous standards as to probable cause pertained, notwithstanding the fact that the vehicle was unattended, encircled by agents of the F.B.I., and that no exigent circumstances prevailed excusing the normal resort to a search warrant? (see *Coolidge v. New Hampshire,* dec. June 21, 1971, U.S. , 9 Cr. L. 3208).

4. Did the trial court err in failing to instruct the jury that if Petitioner was merely an aider and abettor in the crimes charged, the inference of guilty knowledge relating to the tainted origin of both the truck and its contents could not be drawn against him, but only against his co-defendant as a principal?

5. Did the prosecutor's repeated references to the failure of Petitioner to explain his relationship to the stolen truck and its contents constitute improper comment on Petitioner's failure to testify? Were such comments particularly

improper and prejudicial where Petitioner was under no obligation to rebut inferences of guilty knowledge if the jury viewed Petitioner as a mere aider and abettor?

6. Having ruled that Petitioner's arrest by local police after his flight from the truck was unlawful, and that subsequent statements to local authorities therefore would be suppressed, did the trial court improperly advise the jury that Petitioner had made an incriminating post-arrest statement?

Statement of the Case

1. Introduction

Petitioner and his co-defendant, D'Avanzo* were each convicted on December 4, 1970 in the Federal District Court for the Eastern District of New York, (Zavatt, U.S.D.J.), after a jury trial upon three counts for violations of Title 18 U.S.C., §§ 659, 2312, 2314, and 2. Prior to their trial, the District Court conducted a lengthy suppression hearing which terminated with a finding sustaining a seizure by F.B.I. agents of a stolen truck and its contents upon grounds of probable cause and abandonment. The District Court's oral decision on this phase of the case is set forth in Appendix C.

The charges against Petitioners related to their alleged possession and transportation in interstate commerce of a quantity of mercury stolen by unknown persons from a shipment consigned from Mexico to India which required transshipment through the Port of New York. While the

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* We are advised that the co-defendant D'Avanzo intends to file his own petition for a Writ of Certiorari. We, therefore, advert to both defendants in this Court as "petitioners".

merchandise was being trucked by a tractor-trailer from a pier in Staten Island to another pier in Brooklyn for reloading, the mercury shipment (400 cylinders worth $200,000.00) was hijacked, and the emptied tractor-trailer was soon thereafter abandoned in Brooklyn. Two days later, Petitioners were allegedly observed by agents of the F.B.I. driving from Staten Island to Watertown, Connecticut in an International dump-truck from which 326 of the stolen mercury cylinders were later recovered. The dump-truck allegedly utilized by Petitioners to make this interstate trip was, likewise, claimed to have been stolen.

Under Count One of the Indictment both Petitioners were convicted for possessing mercury stolen from a trailer shipment consigned in foreign commerce (18 U.S.C., § 659). Under Count Two, both Petitioners were convicted for violating 18 U.S.C., § 2312 for having transported a stolen vehicle, an International dump-truck, in interstate commerce. With respect to Count Three, both Petitioners were convicted for transporting stolen mercury in interstate commerce (18 U.S.C., § 2314).*

Petitioner Falcone was sentenced to concurrent prison terms (18 U.S.C., § 4208 a-2) of five (5) years under Counts One and Three. Upon Count Two, sentence was suspended but Falcone was placed upon probation for a term of three years to be commenced upon completion of his term of imprisonment.**

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* A fourth count charging receiving and concealing goods stolen from foreign commerce (18 U.S.C. § 2315) was dismissed by the trial court on its own motion at the end of the entire case.

** Petitioner D'Avanzo received a ten year prison term. Both Petitioners are presently on bail.

2. The Government's Case

(a) *Proof of the hijacking; the consignment of goods in Foreign Commerce*

The evidence established that on June 3, 1969, various unknown persons successfully commandeered a tractor-trailer in Staten Island, New York, loaded with flasks of mercury destined for consignment to India (Tr. 226-7, 234-5, 615 et seq.).* The shipment had originated in Mexico and required reloading from a Staten Island pier to a vessel scheduled for departure from a dock in Brooklyn (Tr., *id.*; 606-626). The record is bereft of any proof that Petitioners participated in the hijacking, nor is any claim whatsoever made by the Government that Petitioners functioned in any way except as intermediate receivers (See Opinion of Court of Appeals, Appendix B, p. A4). While the hijacked truck was recovered not long after the theft, and its gas gauge showed that it had not travelled very far, the mercury shipment was missing.

(b) *The search for the missing mercury*

On June 5, 1969, two days after the hijacking, a team of F.B.I. Agents operating in Staten Island placed a late model International truck bearing Petitioner's name on its side door under surveillance (Tr. 254, 263-4, 298 et seq. 419). Suspicion focused upon the truck because it sat so heavily upon its axle, because Petitioner had been a suspect in connection with a similar theft of mercury which had taken place eight months earlier, (Tr. 264; H. 185-187),**

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* References to the minutes of the transcript of the trial are cited as "Tr. - - -".

** References to the minutes of the suppression hearing are cited as "H. - - -".

and because Petitioner operated a scrap-metal yard not far from the scene of the June, 1969 hijacking (H. 185).

Little more than one hour after the F.B.I. surveillance had been set up, the suspect truck commenced a trip which coursed directly through New Jersey, New York and into Watertown, Connecticut, where the vehicle pulled to a halt in a residential *cul de sac,* the lights of the truck were doused, and the Petitioners took to the woods—with several F.B.I. agents in mufti not far behind (Tr. 270, 301 et seq.; 357). The record allows for no serious dispute that Petitioner D'Avanzo had been seen driving the truck and that Petitioner Falcone was observed sitting alongside of him in the front seat (Tr. 301-304, 351).* Both Petitioners were also observed at various stops along the route where D'Avanzo was seen placing telephone calls (Tr. 302, 305).

(c) *The Abandonment of the International Truck; the Apprehension of Petitioners*

From the testimony of the F.B.I. Agents, it may fairly be inferred that the occupants of the truck had reason to believe they were being trailed, although the record is wholly devoid of proof from which it could be assumed that Petitioners knew that their pursuers were law enforcement operatives, as opposed to thieves. At all events, it is clear that Petitioners' vehicle drew to a halt in a darkened *cul de sac,* that the vehicle's lights were doused and that Petitioners took to the woods, rather than be confronted by the strangers advancing toward them on foot. The record does not disclose that the Agents identified themselves, or di-

* While fingerprint evidence tended to establish D'Avanzo's presence in the truck, the Government appeared to be unable to adduce any fingerprint evidence connecting Petitioner to the vehicle (Tr. 440-4, 497-9).

rected Petitioners to "halt". There was, likewise, no proof that Petitioners left the keys to the truck in its ignition.

A minute or so after Petitioners had departed, one of the agents climbed atop his own automobile to peer over the side panel of the truck (Tr. 224). The view was unrevealing, so he climbed aboard the side ledge of the truck, leaned over its side walls and peered into the interior of the storage area with the aid of a flashlight (Tr. 312, 397; H. 208, 226-227). The agent then spied a number of exposed mercury cylinders obtruding from a tarpaulin (Tr. 312-313; 397).

Later that night, Petitioners were separately arrested on the main street of Watertown for disorderly conduct with the apparent connivance of the federal Agents. These arrests were determined by District Judge Zavatt to be unlawful.

Petitioners' truck was kept under guard throughout the night and the following day an inventory of its contents showed that 326 cylinders of mercury had been recovered. It was later determined that the truck in which the mercury was found had also been stolen (Tr. 548-566; 583-8; 597-600; 637-640).

Neither petitioner testified at the suppression hearing or trial.

Reasons for Granting the Writ

I. The Decisions of the Court of Appeals and the District Court on the Issue of Abandonment are Clearly in Error and Conflict with Cases Decided in this Court.

It is significant that the decision of the Court of Appeals impliedly rejects the explicit conclusion of the trial court that probable cause existed for the search which took place in the minutes immediately after Petitioners left the

scene. In this connection, the Court of Appeals affirmance is placed squarely upon the ground that the District Court's finding of an abandonment at the moment of the primary search was "not clearly erroneous" (App. B). Significantly, this somewhat backhanded endorsement of the District Court's "abandonment" holding omits any argument that probable cause existed for the primary search conducted when an agent of the F.B.I. first climbed aboard the truck to peer, with the aid of a flashlight, into its obscured and shielded interior. This is made perfectly clear by the language employed by the Court of Appeals indicating that the so called "plain view" discovery first made by the agents was the factor which itself provided "probable cause" for a fuller search on the following day.

It being apparent that the decision of the Court of Appeals rests in the first instance upon the theory of abandonment, we contest that conclusion as being wholly unsupported both in fact and law and as being at odds with existing authority established in this Court.

In the instant case, the search of Petitioners' vehicle occurred within minutes after Petitioners had left the cab of the truck. Significantly, the truck had been first parked by them. It was not left in the middle of the roadway. The vehicle's headlights were extinguished as the pair removed from the area. No ignition keys appear to have been left behind. There was absolutely no proof establishing that Petitioners were, or should have been aware, that it was law enforcement officers, as opposed to thugs, who had been in pursuit. The record is also devoid of proof that the officers either made their identity known or instructed the Petitioners to halt.

The totality of facts hardly disclosed that Petitioners had wholly and irrevocably divorced themselves from any interest in the vehicle within those first few minutes after which the agents effectively searched and seized their vehicle and its contents. (Cf. *Abel* v. *United States,* 362 U.S. 217, 234-235).

In the *Abel* case, the defendant, upon his arrest, had cast certain unwanted objects into a trash can in his premises while packing together and retaining those items in which he purported to claim an interest. As to the former items, this Court observed that Abel's conduct evidenced a clear intention that they be "thrown . . . away" (*id.* p. 241). In the instant case, no such affirmative act of rejection or disclaimer of an interest in property occurred.

The expressed reliance of the Court of Appeals on its own test as set forth in *United States* v. *Cowan,* 396 F. 2d 83, is also open to serious doubt. According to *Cowan* the proof establishing an abandonment "must be direct or affirmative or reasonably beget the *exclusive* inference of the throwing away" (id. p. 87; emphasis added). We contend that the facts established both at the suppression hearing and upon the trial herein hardly gave rise to "the exclusive inference" of abondonment required by the *Cowan* case.

The opinion of the Court of Appeals is likewise open to serious attack insofar as it conflicts with this Court's decision and opinion in *Coolidge* v. *New Hampshire,* U.S. , dec. June 21, 1971, 9 Cr. L. 3208. In the instant case, the Court of Appeals relies upon a finding that the "plain view" observations of the agent who first saw the partially covered mercury cylinders became the probable cause predicate for the full search which took place on the

day following the seizure of the truck. This rationalization "for the more thorough search which was conducted on the following day" overlooks the rule recently expressed in *Coolidge* that no "plain view" observation can result in a lawful seizure unless the primary intrusion upon the affected property is itself in accordance with law. Moreover, the "plain view" observation has to have been "inadvertent" in nature, following upon a lawful presence and cannot be the result of a direct and premeditated hunt for specific property the nature of which is antecedently known to the authorities. The *Coolidge* case likewise stands for the proposition that:

> "The word 'automobile' [here, a truck] is not a talisman in whose presence the Fourth Amendment fades away and disappears". (*id.*, 9 Cr. L., 3214).

The requirement that "exigent circumstances" attend a warrantless search of a vehicle is thus given strong and renewed recognition by this Court (*id.*, at p. 3216). Manifestly, in a case such as this, where the vehicle was for all intents and purposes under the *de facto* control of F.B.I. agents from the beginning, disregard of the warrant requirements of the Fourth Amendment was improper. As stated in *Coolidge*, (9 Cr. L., at 3216):

> "But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless search as 'per se unreasonable' in the absence of 'exigent circumstances'."

In the light of this Court's recent decision in the *Coolidge* case, the observation of the Court of Appeals that *Chambers* v. *Maroney,* 399 U.S. 42, relaxed the warrant requirements of the Fourth Amendment in this case was wholly mistaken. As respects both the search which took place when Petitioners fled and the fuller search carried out the following day, the agents acted beyond the purview of law in proceeding in each instance without a search warrant.

II. The Court's Charge was Patently Defective in its Treatment of the Issues of Guilty Possession as it Related to Petitioner Falcone's Status as an Alleged Aider and Abettor. Moreover, Proof of Guilty Knowledge and Possession was Insufficient Under All Counts.

Under each of the three counts given by the trial court to the jury for deliberation, petitioners were charged not only as principals, but as aiders and abettors (18 U.S.C. § 2; see Indictment, Counts 1, 2, 3). From the form of the indictment, however, it is not clear whether these were assignments of double responsibility for each petitioner or alternative possibilities of guilty status depending upon the ultimate relationship shown by the proofs to have existed between the petitioners.

Considering the fact that petitioner Falcone had not been seen driving the International dump-truck, did not control its operation; that his fingerprints appeared nowhere on this vehicle or in relation to its driving apparatus, that Falcone had not been observed loading the vehicle or even looking into its storage area; and that the vehicle was never placed at his place of business or home, the premise that Falcone might have been no more than an aider and abettor should not be lightly dismissed. It is against this

background that the trial court's charge relating to guilty knowledge on Falcone's part is to be viewed, for the instructions on this subject failed completely to take up the issue of inferred knowledge in relation to one who may be no more than an aider or abettor.

Despite the nature of the proofs limiting petitioner Falcone's apparent complicity, and notwithstanding the aiding and abetting reference made in each count of the indictment, the trial court instructed on the issue of guilty knowledge only in relation to the inference which might be drawn against a *principal* by reason of his unexplained possession of recently stolen goods (Minutes, Sept. 29, 1970; Court's Charge, pp. 21-25). No effort was made by the trial court to deal with the problem of inferred guilty knowledge as it might relate to a defendant appearing to be solely in the status of an aider and abettor. This omission was crucial since the rule permitting an inference of culpable knowledge respecting the origin of recently stolen goods is not applicable where a defedant's guilt is made to rest solely on an aiding and abetting thesis (*Pearson* v. *United States*, 6 Cir. 1951, 192 F. 2d 681, 692-3; *Barfield* v. *United States*, 5 Cir. 1956, 229 F. 2d 936, 943, Fn. 5; *Johnson* v. *United States*, 8 Cir. 1952, 195 F. 2d 673). In such a case, the defendant's guilty mental state cannot be established except by proof of knowledge or behavior on the abettor's part actually evidencing recognition of the tainted origin of the items in question.

The authorities indicate that the inference of guilty knowledge comes into play only where the defendant has "possession" of the recently stolen goods (id.). Significantly, the cases likewise establish that mere presence at

the scene of a crime, or even presence upon, or inside, the stolen object will not, by itself, establish the basis for knowing and guilty possession (*Johnson* v. *United States*, supra, 675-6; 22 C.J.S. § 886(3), 160). Thus, in prosecutions under the Dyer Act (18 U.S.C. § 2312—Count 2 herein) it is well established that mere presence as a passenger in a stolen motor vehicle is insufficient to trigger the rule permitting an inference of guilty possession (*Fitzpatrick* v. *United States*, 5 Cir. 1969, 410 F. 2d 513, 515-6; *Allison* v. *United States*, 10 Cir. 1965, 348 F. 2d 152; *Barfield* v. *United States*, 5 Cir., 1956, 229 F. 2d 936, 939-41; *Johnson* v. *United States*, supra).

In the instant case, no effort whatsoever was made by the trial court to define the ingredients which constituted "possession" of the stolen vehicle or mercury as it related to petitioner Falcone, a passenger whose conduct evidenced absolutely no dominion or control over the stolen International truck. Such vehicle, it will be remembered, started out from a premise at which D'Avanzo alone was said to have been employed (Charge, p. 22). In this connection the court simply charged: (id.)

> "There is evidence . . . in this case from which if you believe it you can find that both defendants were in this truck during the entire trip from Staten Island to Watertown, Connecticut and *were in possession of the truck and its contents* . . . ." (emphasis added).

Based upon the authorities cited above, this instruction was wholly inadequate to define the concept of possession as it bore upon petitioner Falcone. While counsel for Falcone interposed no exceptions or requests on this score, or specifically in relation to the aiding and abetting feature of

our argument above, we urge that the deficiencies and omissions in the court's charge as noted by us constitute plain error affecting substantial rights of petitioner Falcone (Fed. Rule Crim. Proc. 52(b); see also *Barfield* v. *United States,* supra, 229 F. 2d 936, 940-1). In this connection, it should not be overlooked that trial counsel for Falcone did move at the end of the government's direct case (Tr. 687-8) and at the conclusion of the entire case (Tr. 689), to

> "dismiss the indictment and each count thereof on the ground that the government has failed to make out a case; that the government proof at best would clearly show that—if credited, that the defendant Falcone was a passenger in a truck containing allegedly stolen matter . . . and that is inadequate and insufficient as a matter of law to make out a case against him.".

The common problem affecting all three counts under which petitioner Falcone was convicted is the issue of "possession" of the 1969 International truck. Unless Falcone possessed this vehicle in a sense indicating dominion and control over its operation and direction, he could not be guilty under Count II for transporting a stolen vehicle in interstate commerce. As shown, mere status as a passenger is not coequal with possession and control of a vehicle sufficient to establish responsibility for its illegal interstate transportation. By a parity of reasoning, mere presence as a passenger in a vehicle carrying stolen mercury could not supply the ingredient of inferred knowledge of theft, which was a vital requirement under Count I. Finally, if petitioner Falcone lacked sufficient dominion and control to be culpable under the Dyer Act for transporting a stolen vehicle

in interstate commerce, he was, *a fortiori,* incapable of guilt for transporting the vehicle's contents for, as he did not legally "possess" the vehicle, he could not "possess" its contents.

In sum, we urge that proof of petitioner Falcone's guilt under each count of the indictment was insufficient in law, and that the court's charge was so defective in relation to the matters discussed herein as to have required, as to Falcone, a reversal of his conviction upon each count, and either the dismissal of the indictment, or a new trial.

III. The Prosecutor's Summation Statements Relating to the Failure of Petitioners to Explain Their Alleged Possession of the Stolen Truck and Mercury Was Necessarily Taken by the Jury to be a Comment on the Failure of Both Petitioners to Testify.

As indicated above, neither petitioner took the stand in his own defense. That feature of the case, unfortunately, became the subject of repeated comment by the prosecutor —both directly and indirectly, during the course of his summation (Tr. 795, 801, 802). It appears that the ostensible excuse for these damaging references was in some way related to the legal proposition, which the prosecutor sought to convey to the jury, that *unexplained* possession of recently stolen property gives rise to an inference of knowledge of the tainted origin of such property. We complain, however, that the prosecutor's repeated argument in summation along this line exceeded the limits of proper comment, that his multiple and extended references improperly usurped the court's function to explain this feature of the case in a balanced and careful fashion which would give proper protection to the countervailing right of each petitioner to be spared reference to his silence in court. Beyond

this, an examination of the prosecutor's remarks discloses that his comments went far beyond mere observations regarding the absence of proof tending innocently to explain the alleged possession of both the International truck and the mercury. His statements referred directly to the failure of the "defendants" to supply exculpatory proof. Finally, all of the references of the prosecutor neglected to observe that one in the position of a mere aider and abettor was under no obligation whatsoever to rebut an inference of guilty knowledge. As indicated in paragraph heading I herein, petitioner Falcone's position in this case, on the evidence and in view of the indictment itself, was not necessarily that of a principal against whom the inference of knowledge could operate.

For the convenience of the Court, we set forth the offending references which we contend deprived Falcone of a fair trial. In each instance, objection by counsel was timely made and the error having been brought to the trial court's attention should have been—but was not corrected.*

> "Mr. Lynch: Have we heard any evidence that the defendants subsequently went up to Watertown, Connecticut to claim the mercury in the truck?" (Tr. 795)
>
> • • •
>
> "Mr. Lynch: In connection with a certain charge that you Judge will deliver to you, ladies and gentlemen, unless there is a . . . *unless the defendants' advance information* you are satisfied with as an ex-

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* We proceed on the ground that objections tendered by one defense counsel inured to the benefit of the other in light of the trial court's treatment of the objection indicating that duplicated objections would have been fruitless (*United States* v. *Lefkowitz*, 284 F. 2d 310, 313, Fn. 1).

planation that is consistent - - ". (Tr. 801, emphasis added).

• • •

"Mr. Lynch: I submit to you ladies and gentlemen that the *defendants haven't advanced* any explanation consistent with innocence about the possession of this mercury or this truck." (Tr. 802, emphasis added)

The foregoing comments, to which counsel interposed vigorous objections, were of such a character that the jury naturally and necessarily took these as a comment on the failure of both petitioners to testify (*Doty* v. *United States*, 10 Cir. 1968, 416 F. 2d 887, 889-891; *Desmond* v. *United States*, 1 Cir., 345 F. 2d 225; see also *United States* v. *Nolan*, 10 Cir. 1968, 416 F. 2d 588, 593-4). This is especially so where explanatory evidence of innocent possession could have come only from the petitioners (*Desmond* v. *United States, supra.*, and see *Doty* v. *United States, supra*, 416 F. 2d 889-90). Indeed, the "defendants" were explicitly accused of having failed to put forward such evidence in court.

Since proof of petitioner Falcone's guilt was hardly overwhelming, and speculative at best, the comments of the prosecutor were not "harmless beyond a reasonable doubt" (*Chapman* v. *California*, 1967, 386 U.S. 18, 24). Accordingly, petitioner Falcone was entitled to a mistrial.

IV. The Trial Court Improperly Advised the Jury that Statements of the Petitioners Made to the Watertown Police Had Been Suppressed. The Court's Remarks in this Regard Strongly Implied that Such Statements Had Been Inculpatory.

It will be recalled that, as a result of a suppression hearing conducted prior to trial, the District Court ruled that the arrest of each petitioner by the Watertown police was

unlawful and that all evidence, including statements of the petitioners to the local police following upon their arrest would be suppressed (Tr. 339-40; see also Minutes of Court's Ruling, Sept. 21, 1970, Z1-Z10). In a flagrant and unprovoked breach of both the letter and spirit of his own ruling in this regard, the trial court subsequently—and in the presence of the jury—gratuitously remarked that statements of the petitioners taken by the Watertown police after their arrest were not admissible at the trial (Tr. 537-8). The court's statement necessarily conveyed to the jury the fact that the defense had objected, prior to trial, to the admission of cerain incriminating evidence and that the court had conducted a hearing and had ruled against the admission of the damning evidence. Whatever good had been accomplished for the defense by the outcome of the pre-trial hearing was, accordingly, swept away.

The highly prejudicial gaffe occurred in the following fashion. The Government, on its direct case, had brought out the fact that both petitioners had been arrested for disorderly conduct by the Watertown police (Agent Hayes, Tr. 314; Ptl. Kennedy, Tr. 461; Sgt. Esso, Tr. 537). At one point in the direct testimony of Patrolman Kennedy regarding petitioner Falcone's arrest, the latter's trial counsel, quite properly, requested an instruction to the jury that Falcone's arrest at that time was "illegal" (Tr. 538).

The defense was surely enitled to have the jury know that Falcone's presence abroad the streets of Watertown at 5 A.M. was not an unlawful act. It would have been wholly unfair to leave the matter in such a fashion as would have the jury believing that Falcone had been quite properly arrested and was, therefore, guilty of violating Connecticut

law. The trial court was not prepared, however, to allow the defense to clarify this matter and remove it from the case entirely as a feature which might have some influence upon the overall question of guilt or innocence. Therefore, instead of complying with defense counsel's entirely proper request for a ruling, the trial court delivered what can only be interpreted as a premeditated *coup de grace* (Tr. 463-4). Accordingly, the trial judge stated. (Tr. 538)

> "The Court: I must tell you, ladies and gentlemen, that I conducted a pretrial hearing and I ruled that if a person is running down the street or is walking on the street at 5:00 o'clock in the morning, or 3:00 o'clock in the morning, that I do not think that is a crime or disorderly conduct, and therefore when both of these defendants were arrested on that charge by the Watertown police *that any statements that may have been made by either of these defendants after they were placed under arrest would not be admissible on this trial.*" (emphasis added)

Immediate objection and a motion for a mistrial was interposed, to no avail (Tr. 538-9). Matters were worsened when the trial court reinforced the idea that a suppression hearing had been conducted to keep out incriminating matter, by stating: (Tr. 539)

> ". . . [the suppression hearing] was held for the purpose of determining whether any evidence, if any, following the arrest could be admitted . . . ."

This second ill-considered remark could only have caused the jury to wonder why a pretrial hearing had been held at all, if it was not for the purpose of keeping out statements which could have incriminated the petitioners. The court's utilization of the words ". . . whether any evidence, *if any*

. . ." did not avoid the prejudice. Again, why have a pre-trial hearing to suppress unless the defense was bent on keeping out of evidence some damning testimony? Appellate courts regularly give credit to juries for employing common sense and not being easily taken in. Any juror worth his salt could not but conclude that petitioner Falcone had given a statement to the local police which had been kept out of evidence on some technicality relating to the impropriety of his unlawful arrest for disorderly conduct.

It is reversible error for a court to make known to the jury his *in camera* rulings where the disclosure of such rulings tend improperly to influence the jury's view of the evidence in the case, and the opposing positions of counsel (*United States* v. *Costner,* 359 F. 2d 969). Where the effect of advising the jury of the court's private ruling is also to generate spectres of the existence of forbidden proof, the prejudice to the defense is clear (*Garris* v. *United States,* D. C. Cir., 390 F. 2d 862; *People* v. *Cagle* (Illinois) 244 N.E. 2d 200). In the instant case, the trial court's utterances injected a prejudice into the case which was substantial and quite likely affected the verdict against petitioner Falcone.

CONCLUSION

For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
230 Park Avenue
New York, New York 10018
Attorney for Petitioner
Vincent Anthony Falcone

Of Counsel:

LAWRENCE K. FEITELL
1450 Broadway
New York City, New York 10018

APPENDIX A

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of June one thousand nine hundred and seventy-one.

Present:

HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
HON. WALTER R. MANSFIELD,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEWIS VINCENT D'AVANZO AND VINCENT ANTHONY FALCONE,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Appendix A—Judgment of Affirmance of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 961, 962—September Term, 1970.

(Submitted May 26, 1971 Decided June 9, 1971.)

Docket Nos. 71-1012, 71-1029

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

LEWIS VINCENT D'AVANZO and
VINCENT ANTHONY FALCONE,

Defendants-Appellants.

Before:

KAUFMAN and ANDERSON, *Circuit Judges,* and
MANSFIELD,* *District Judge.*

Appeals from convictions after a jury trial in the United States District Court for the Eastern District of New York, before Joseph C. Zavatt, *District Judge,* for possessing mercury cylinders stolen from an interstate shipment, 18 U.S.C. §659, transporting a stolen truck in interstate commerce, 18 U.S.C. §2312, and transporting stolen mercury in interstate commerce, 18 U.S.C. §2314.

Affirmed.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix B—Opinion of the United States Court of Appeals

MAURICE EDELBAUM, New York, N. Y. (Lawrence K. Feitell, of counsel), *for defendant-appellant Falcone.*

EVSEROFF, NEWMAN & SONENSHINE, Brooklyn, New York (William Sonenshine, of counsel), *for defendant-appellant D'Avanzo.*

MERVYN HAMBURG, Attorney, United States Department of Justice, Washington, D. C. (Edward Neaher, United States Attorney, Eastern District of New York, on the brief), *for plaintiff-appellee.*

PER CURIAM:

Appellants were convicted by a jury and subsequently sentenced under three counts of a four-count indictment, for possessing and transporting in interstate commerce, and in a truck whose cab had been stolen, a quantity of some 326 mercury cylinders which had previously been hijacked. The cylinders were being transported from a pier in Staten Island, New York, where they had arrived by ship in May 1969, to another pier in Brooklyn. The truck from which the cylinders were stolen was recovered the day after the hijacking.

Viewing the evidence most favorably to the Government, as we must at this juncture, *United States* v. *Kahaner,* 317 F.2d 459, 467 (2d Cir. 1963), *cert. denied* sub nom. *Corallo* v. *United States,* 375 U.S. 835 (1963), the proof at trial adequately supported defendants' convictions. Neither defendant was identified as a participant in the thefts either

of the mercury cylinders or of the truck. Shortly after the cylinders (each of which weighed about 100 pounds) had been reported stolen, FBI agent George Moresco observed an International truck cab with a dump-truck type body (open on top) riding low on its axles and thus obviously carrying a heavy load, parked in front of a scrap metal yard on Staten Island. The truck was placed under surveillance and several agents followed it closely as the truck proceeded north from Staten Island via the Connecticut Turnpike to Watertown, Connecticut. During the course of this journey, FBI agent James Hays was able many times to observe D'Avanzo driving the truck and Falcone sitting in the passenger seat.

After the truck entered Watertown at about 2:30 a.m. on June 6, D'Avanzo appeared to be getting ready to turn into a street leading to the Infeld Metal Company but then for some reason changed his mind and proceeded ahead for two more blocks before turning into a U-shaped residential street, Bessamy Avenue,[1] which led nowhere but back to the road upon which the truck had been traveling, Falls Avenue. D'Avanzo parked a short distance down Bessamy Avenue. While several FBI agents remained in another car on Falls Avenue (contiguous to Bessamy), Agent Hays stopped his car short of Bessamy Avenue and walked toward the other FBI vehicle, whose headlights were on. The agents saw appellants leave the truck and walk in their direction for a short distance. But then, as they approached Hays, both turned in the opposite direc-

[1] From among many different versions in the record of the name of this street, we have adopted that form used by the parties in this appeal..

tion and proceeded at a trot into a swampy wooded area behind Bessamy Avenue.

Their retreat prompted Agent Hays to inspect the inside of the truck with his flashlight. The panels were sufficiently high that it was necessary for him to stand on a ledge running around the body of the truck in order to view, through the open top, the exposed interior of the dump truck. Without disturbing a tarpaulin that covered only part of the truck's cargo, Hays was able to observe several exposed cylinders, later identified as part of the stolen shipment of mercury cylinders. Further investigation revealed that the serial number on the motor of the truck corresponded with that of a 1969 flat-bed International truck stolen from the Port Equipment Renting Co. in March 1969. Under a layer of fresh paint on the left door of the cab the name "Port Equipment Renting Co." was still visible.

Prior to the trial, Judge Zavatt conducted a hearing on D'Avanzo's motion to suppress the fruits of the search and seizure of the truck and its contents on the ground that Agent Hays acted without a warrant. After a hearing, Judge Zavatt ruled that the defendants had "abandoned" the truck and its contents prior to Hays's inspection and thus there had been no "search and seizure" within the meaning of the Fourth Amendment to which appellants could object. Whether there has been an abandonment presents a question of intent. Like other factual findings by a district court we may disturb Judge Zavatt's finding that defendants relinquished any interest they may otherwise have had in protecting the privacy of the exposed

portion of the dump truck only if the finding is clearly erroneous. *United States* v. *Cowan,* 396 F.2d 83, 87-88 (1969). Under the circumstances present here we believe Judge Zavatt's finding was not clearly erroneous. Hays's inspection invaded no aspect of the defendants' legitimate interests in privacy. In arriving at this conclusion, we have considered, in addition to defendants' flight into the woods and the attendant circumstances, the minimal intrusion into the truck that resulted from Hays's inspection. We are mindful also that traditionally, as the Supreme Court has recently had occasion to reaffirm, "there is a constitutional difference between houses and cars." *Chambers* v. *Maroncy,* 399 U.S. 42, 52 (1970). After Hays had observed a number of the cylinders in plain view, moreover, probable cause existed for the more thorough search of the truck which was conducted on the following day.

We have examined appellants' other points and find them without merit.

The convictions are affirmed.

APPENDIX C

Minutes of Court's Decision on Denial of Motion to Suppress

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

69-CR-370

UNITED STATES OF AMERICA,

Plaintiff,

—against—

LEWIS D'AVANZO and VINCENT FALCONE,

Defendants.

United States Court House
Brooklyn, New York
September 21, 1970

Before:

HON. JOSEPH C. ZAVATT, *U.S.D.J.*

Appearances:

EDWARD R. NEAHER, ESQ.
United States Attorney
Eastern District of New York
By: JOSEPH LYNCH, ESQ.
Assistant U.S. Attorney

Appendix C—Minutes of Court's Decision on Denial of Motion to Suppress

MESSRS. EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Defendant D'Avanzo
By: WILLIAM SONENSHINE, ESQ.,
of Counsel
—and—
NATHAN KESTNBAUM, ESQ.,
Attorney for Defendant Falcone

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

EMANUEL KARR
Official Court Reporter
U.S. District Court

(On the morning of September 21, 1970, following a Suppression Hearing in the above entitled matter, the following proceedings occurred.)

The Court: All right, gentlemen.

I am ready to rule on the motion to suppress.

Number one, I might tell all of you that I have studied the transcript very carefully and the memoranda, and of course I read cases on the subject that I am not entirely unfamiliar with, one of the most recent ones is Chambers against Monroney, and here there was a question of searching automobiles—I don't know whether you lawyers have read it, it is fairly recent, it wasn't decided until June 22nd of this year by the Supreme Court, and it is reported in 90 S. Ct. Reporter at Page 1975. Before I get to the question of search and seizure based on probable cause and the

question of abandonment, which does not involve search and seizure, I want to direct my attention to the arrest of the two defendants.

Now the arrest has nothing to do with the search and seizure of what was in the automobile. The arrest occurred a mile or so away from where this truck was left. But there was some testimony that I heard about what one of the defendants said after he had been advised of his rights, after he had been shown a printed form containing the Miranda Warning, the right to counsel and so forth. I think that the defendant was D'Avanzo, was it not?

Mr. Lynch: Yes, Your Honor.

The Court: I think the testimony is that this defendant had a year of college education, he is the defendant, and whoever it was, the local policeman up there in Watertown, Connecticut, had asked him what his education was and he said a year of college, and he then asked him some question about what he was doing up there on Main Street and he gave some answer that was apparently thought to be inconsistent with what he said at Main Street. Then in the transcript I notice that a question was asked by Mr. Sonenshine as to whether any fingerprints were taken, and the Government attorney objected and I sustained the objection because I think I had a right to assume from the facts that the Government was objecting that there was no question of any fingerprints coming up in connection with the motion to suppress. Now I don't know whether fingerprints were taken at Watertown that morning, but if they were, then I don't know why—that is if they are going to be offered—as I say, if the Government should offer them then I wouldn't understand why counsel objected to the question. I would think that the objection was proper if

there were no question of the offering of any fingerprints taken that day.

I can't see any ground for arresting either one of these men for disorderly conduct. I don't think that running down a street at any hour of the morning, even though one is in quite a sweat, constitutes disorderly conduct. As I read the transcript maybe he could have been arrested on some other ground, but neither one of them was, and the amount of bond that had to be put up was so nominal—I don't remember whether it was $35 or $45, I don't remember whether it was either, and that, too, indicates that it was for something as minor as an alleged disorderly conduct. I have never seen the complaint, if there was a complaint, or the inquiry on the station house card, if that is all that is needed to say that, we are arresting him for disorderly conduct.

Nor do I think that if the other defendant, Falcone, was walking on Main Street, even though he could have been lying through his teeth when he said that he had come up for his wife's Buick which broke down a few miles away and that he was on his way to his sister and his sister lived twenty or twenty-five miles south of Watertown—if it is a crime to lie, and I must for the purposes of this motion take the testimony that I have heard, I don't think that is disorderly conduct, I don't think it is disorderly conduct if you are lost somewhere. It could be very suspicious, these two people who have been identified as having been in that stolen truck, and D'Avanzo has been identified as the driver and the other fellow as a passenger sitting alongside of him, yes, very suspicious, and shortly after this truck come to a stop, the lights are turned off, and these two fellows are up on Main Street.

Appendix C—Minutes of Court's Decision on Denial of Motion to Suppress

Now there was nothing that came out at the hearing as to what Falcone said, if he said anything, at the station house.

Is that correct?

Mr. Lynch: That is correct, Your Honor.

The Court: Whatever he said on the street when they said, "Where are you going," and they weren't in custody, that would be admissible on the trial, whatever Falcone said there on Main Street is admissible, but the statement that Falcone made, even though he was given the Miranda warning, I am ruling is not admissible because I don't think that either one of these arrests was a proper arrest for disorderly conduct.

Now as far as the truck and the stolen Mercury, I should say the stolen truck and the stolen Mercury and the stolen truck with the stolen plates, although when it comes to the plates one must consider where the truck was usually quartered and the fact that the theft of the plates was not reported until the 9th, so one might wonder whether the man who owned the truck with those plates loaned it to these fellows, and maybe knowingly, and then, when he found out that they had been caught, six days after the event he reported the plates stolen. But he is not a defendant on trial in this case.

I have gone through the entire record very carefully, I am familiar with the cases on abandonment. I rule that these two defendants abandoned this truck.

Mr. Sonenshine is quite right on the question of probable cause, the Court should know that nobody knew the truck was stolen, that is none of the FBI or the Connecticut officers knew that the truck was stolen, and the fact that the truck was stolen won't be a factor as to whether there was probable cause, but I think it is a factor as to whether these

defendants abandoned this truck. I can draw the inference that they knew this truck was stolen. They knew that the truck had the name Falcone printed on it in white letters, that is on at least one door of the cab; they knew before they left that yard that that lettering had been painted over with red paint.

I have a complete outline of all of the evidence in this case.

I find that this truck was abandoned by these defendants.

I don't know, it may come out on the trial that at the time they got there they knew they were being followed by the FBI, but I suppose having heard Mr. Sonenshine say so then at the trial there probably will be a claim they thought that the truck was being hijacked. If so, they acted quite strangely, instead of running down to the truck and getting into the truck and starting off, they run into the woods and they are found an hour later running up and down Main Street.

It is true that a defendant has standing on a motion to suppress something allegedly unlawfully searched and seized, they do not have to claim a proprietory interest. I am not so sure that the fact that they never did make any claim to the truck or its contents at any time has any bearing on the question as to whether or not they abandoned the truck.

So I deny the motion to suppress the truck and the contents firstly on the ground that there was no unlawful search and seizure, that the truck was abandoned

I deny it on a second ground that under all of the facts and circumstances which have been testified to before me, the Federal Bureau of Investigation had probable cause to believe that this truck—not knowledge, you don't have to have knowledge—that this truck contained the fruits of a

crime, and so I deny the motion to suppress on that ground as well.

We are now ready to proceed to trial.

The Clerk: Shall I call for a jury?

The Court: Yes.

APPENDIX D

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 659 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck,

or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

. Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or . . .

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . .

18 U.S.C. § 2312 provides:

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Appendix D—Constitutional and Statutory Provisions Involved

18 U.S.C. § 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .